

file

BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals



Application of Bryce Styza for a Permit to Place
Fill in a Wetland, City of Waukesha, Waukesha
County, Wisconsin

Case No. 3-SE-93-651

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER APPROVING
WATER QUALITY CERTIFICATION AND GRADING PERMIT

Mr. Bryce Styza, 2727 North Grandview Boulevard, Suite 100, Waukesha, Wisconsin, 53187, applied to the Department of Natural Resources for a permit to grade in excess of 10,000 square feet on the banks of a Pebble Brook tributary. The proposed purpose of this project is to construct an office warehouse park with buildings and parking spaces. The project would involve the filling of .95 acres of wetlands. Accordingly, the Department of Natural Resources reviewed the application for Water Quality Certification. The proposed project is located in the SE ¼ of the SW ¼ of Section 15, Township 6 North, Range 19 East, City of Waukesha, Waukesha County, Wisconsin.

Pursuant to due notice hearing was held on September 2, 1997, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Bryce P. Styza
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Waukesha, Wisconsin 53187-0966

Russell C. Evans
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Wisconsin Department of Natural Resources, by

Michael Cain, Attorney
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FINDINGS OF FACT

1. Bryce Styza, 2727 North Grandview Boulevard, Suite 100, Waukesha, Wisconsin, 53187, completed filing an application with the Department for a permit under sec. 30.19, Stats., to grade in excess of 10,000 square feet on the banks of a tributary to Pebble Brook, City of Waukesha, Waukesha County. The Department and the applicant have fulfilled all procedural requirements of secs 30.19 and 30.02, Stats.

2. The applicant owns real property located in the SE ¼ of the SW ¼ in Section 15, Township 6 North, Range 19 East, Waukesha County. The above-described property is on the banks of a tributary to Pebble Brook which is navigable in fact at the project site.

3. The applicant proposes to fill .95 acres of wetlands and to grade in excess of 10,000 square feet in connection with the development of an industrial park in the City of Waukesha. The subject parcel is included in the 1984 Wisconsin Wetlands Inventory Map, and the applicant does not dispute that the parcel is wetland within the meaning of Wisconsin law.

4. The purpose of the fill and grading is to allow for development of an industrial manufacturing park in the City of Waukesha. Specifically, the fill area would support construction of buildings seven and eight as a part of a larger industrial park. The entire project area is zoned M1 for general and industrial uses. All buildings would be constructed outside of the 100 year flood plain. (Exhibit 12)

5. The applicant has not yet received a fill permit from the U.S. Army Corps of Engineers (COE), but expects to receive a general COE permit because the proposed wetland fill is less than one acre in size.

6. The current proposal represents a compromise between the permit applicant and the Department. The applicant sought to fill 4.5 acres in 1993. That application was denied. Subsequently, a meeting was held involving the applicant, Department staff and representatives of the South East Wisconsin Regional Planning Commission (SEWRPC).

Both the DNR and the SEWRPC agreed that , under the unique circumstances of this case, they would not oppose issuance of the Sec. 30.19, Stats. permit and the water quality certification, so long as the area of wetland to be filled did not exceed. .95 acres.

The applicant made significant improvements to the parcel prior to the existing regulatory scheme relating to water quality certification for wetlands. The parcel has city water and sewer access. The SEWRPC chief biologist, Donald Reed, testified that SEWRPC approved sewer extensions to the project area in the mid 1980's. City water access was installed at considerable cost to the applicant. In total, Mr. Styza testified that he had spent "100's" of thousands of dollars on improvements to the subject parcel. Reed opined that similar circumstances would be highly unusual today, as developers are familiar with the regulatory scheme and would not invest such substantial amounts prior to receiving approval for the wetland fill. Accordingly, it is unlikely that approval of the instant permit applications would have a detrimental cumulative impact by way of any implied precedent for other wetland fill projects.

7. A clear preponderance of the credible evidence demonstrates that approval of the instant application will not lead to detrimental cumulative impacts because it would be unlikely that other projects would present this unique set of circumstances in terms of prior improvements and limited detrimental impacts to wetland functional values.

8. Johnson and Reed both provided undisputed expert testimony that the proposed grading and fill project would not have significant detrimental impacts on wetland functional values. Each testified that there would be some secondary improvements in the water quality protective function of the wetland because eroding banks in the area would be stabilized.

There would not be a significant detrimental impact on water quality, wildlife habitat, flood water storage on other significant wetland functional values. (Johnson, Reed).

9. Given the substantial investment in improvements to the subject parcel, there are no practical alternatives to the proposed grading and fill project taking into consideration cost and logistics in light of overall project purposes.

10. The proposed grading and fill project will not cause environmental pollution as defined in sec 144.01(3), Stats.

11. All of the permit conditions set forth below are necessary to protect the public interest in navigable waters. There will not be a detrimental impact to the public interest upon compliance with the conditions in said permit.

12. Johnson testified that the proposed project area is identified by SEWRPC as a "primary environmental corridor." The applicant dedicated an 80 acre adjacent parcel wetland parcel to the City of Waukesha, which is now part of Pebble Brook Park. Further, Pebble Brook is tributary to the Fox River, a priority watershed. Johnson opined that the earlier proposal to fill 4.5 acres would have had a significant detrimental impact on flood storage. However, both Johnson and Reed opined that the instant proposal would not have a significant impact on either the primary environmental corridor or the Fox River priority watershed.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification and grading permit cases pursuant to secs. 227.43(1)(b) and 30.19, Stats. and NR 299.05(6), Wis Admin. Code.

2. The proposed fill for construction of an industrial park is not a wetland dependent activity within the meaning of secs. NR 103.07(2) and NR 103.08(4)(a)(1), Wis Admin. Code., because said construction is not of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.

3. No practical alternatives to the fill proposal exist which would not adversely impact wetlands and will not result in other significant environmental consequences. Sec. NR 103.08(4)(a)(2) Wis. Admin. Code. Practical alternatives means available and capable of being implemented taking into consideration cost, available technology and logistics in light of overall project purposes. Sec. NR 103.07(1), Wis. Admin. Code. Given the significant prior investment in improvements to the parcel, the cost of pursuing other alternatives would be impractical.

4. The project proponent has shown that the activity will not result in significant adverse impacts to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences. There will be no "significant detrimental impacts" to the functional values of the subject wetlands. A clear preponderance of the evidence, including all of the expert testimony, indicates that there would be no significant detrimental impacts to water quality protection, wildlife habitat, or flood water storage if the proposed fill is approved.

5. The subject property is located within an area of special natural resource interest within the meaning of NR 103.04, Wis. Admin. Code. The parcel is located in a "primary environmental corridor" as identified by SEWRPC and is associated with the Fox River, a priority watershed.

6. The Division of Hearings and Appeals has the authority pursuant to NR 299.05, Wis. Admin. Code, to deny, approve or modify a water quality certification if it determines that there is a reasonable assurance that the project will comply with standards enumerated in NR 299.04, Wis. Admin. Code. The Division is satisfied that there is a reasonable assurance that the project will comply with said standards, based upon the undisputed expert testimony.

7. Unless a permit has been granted by the Department of Natural Resources, it is unlawful to construct, dredge or enlarge any artificial waterway, canal, channel, ditch, lagoon, pond, lake, or similar waterway where the purpose is ultimate connection with an existing navigable stream, lake or other navigable waters, or where any part of the artificial waterway is located within 500 feet of the ordinary high-water mark of an existing navigable stream, lake or other navigable waters. Sec. 30.19(1), Stats.

8 The applicant has carried his burden of proof in demonstrating that the project will not injure public rights or interests, including fish and game habitat, that the project will not cause environmental pollution as defined in sec. 144.01(3), Stats., that any enlargement connected to navigable waterways conforms to the requirements of laws for the platting of land and for sanitation and that no material injury to the rights of any riparian owners on any body of water affected. (Sec. 30.19(4), Stats) The conditions in the permit set forth below are reasonable and necessary to protect the public interest.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, a permit under sec. 30.19, Stats , for the grading as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.
2. A copy of this permit shall be kept at the site at all times during said grading.
3. The permit granted herein shall expire three years from the date of this decision, if the grading is not completed before then.
4. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U. S. Army Corps of Engineers.
5. The applicant must employ the standard erosion control measures based on the Wisconsin Construction Site Best Management Handbook. These include but are not limited to the following:
 - A. A double row of silt fence around the site. Silt fence must be checked weekly and repairs made immediately.
 - B. No silt fence shall be installed across the waterway.
 - C. Any soil stock piles in place for more than 7 days must be seeded and mulched. Silt fence must surround the down slope side of any soil stockpiles.
6. Any area left undisturbed for more than 7 days shall be seeded and mulched. To the extent possible, the permit holder shall use native species in any plantings associated with this project.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that Water Quality Certification be GRANTED, in connection with and future issuance of an Army Corps of Engineers Fill Permit, subject to the following conditions:

The fill area shall be limited to no more than .95 acres.

The permit holder shall comply with all conditions of the U S. Army Corps of Engineers fill permit.

Dated at Madison, Wisconsin on October 2, 1997.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By:



JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2 Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.